



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: May 14, 2009

CBCA 1264

SOUTHWESTERN SECURITY SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Edward Gregorowicz, Jr., of the Law Offices of Edward Gregorowicz, Jr., Fairfax, VA, counsel for Appellant.

Christine L. Krell, U.S. Immigration and Customs Enforcement, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS, GILMORE, and POLLACK.**

SOMERS, Board Judge.

Southwestern Security Services, Inc. (Southwestern) seeks reimbursement for additional expenses related to guard services provided to the Department of Homeland Security (DHS or the Government), Federal Protective Service, in southern Louisiana, immediately post-Hurricane Katrina. The parties have elected to submit this appeal for decision on the written record pursuant to Rule 19 of the Board's Rules of Procedure. The record consists of the pleadings, appeal file, Southwestern's memorandum of points and authorities in support of its record submission, the Government's memorandum of law in support of its record submission, and Southwestern's reply brief in support of its record submission. For the reasons set forth below, we deny the appeal.

Background

On June 30, 2005, Southwestern and the Government entered into Contract No. GS-07F-0306L, Task Order No. HSCEFC-05-F-F00014 (the contract). Pursuant to the task order, Southwestern agreed to provide armed guard services at federal buildings and facilities located in the southern part of Louisiana. Appeal File, Exhibit 1.¹ The contract began on July 1, 2005, and was in effect when Hurricane Katrina made landfall in Louisiana in August 2005. Answer ¶ 10.

Pursuant to the contract, Southwestern provided guards for specific posts for a firm fixed hourly rate. The statement of work (SOW) contained instructions to be used for preparing the proposed rate, and required Southwestern to include all direct costs, indirect costs, and profit in its proposed hourly rate. When the Government awarded the task order to Southwestern, the firm fixed hourly rate proposed by Southwestern formed the basis for the contract price. Exhibit 1 at 99-101. The contract required Southwestern to provide approximately eighty guards per month for regular, permanent posts. Exhibit 1; Government's Memorandum of Law, Attachment 2.

As part of the contract requirements, in addition to providing guard services for the permanent posts, Southwestern had to maintain a reserve guard force of sufficient size to enable it to provide the amount of temporary or emergency staffing needed in the event of natural disasters, civil disturbances, emergencies, and other situations. Exhibit 1 at 18. As with the firm fixed hourly rate for the permanent guard posts, the SOW required Southwestern to factor the costs for maintaining a reserve guard force into the bid price. The SOW warned that the contractor would not be reimbursed for additional costs outside of the fixed hourly rate once the task order was awarded. Exhibit 1 at 18-19. As to the costs of the temporary posts, the SOW stated expressly that:

c. The hourly prices that are offered on your production spreadsheets shall be the same hourly prices that will be paid for TAS/SAS [Temporary Additional Services/Special Additional Services]. These prices shall be inclusive of all the Offeror's direct costs, indirect costs, and profit. Offerors shall include all costs associated with providing the services described in and required by this SOW.

¹ All exhibits are found in the appeal file, unless otherwise noted.

d. The Government shall not be responsible for compensating the Contractor for any costs tied to Solicitation/Contract requirements but not factored into the Contract prices, either by the Contractor's intention or by mistake.

Exhibit 1 at 102 (emphasis in original).

Under the contract, either the contracting officer (CO) or the contracting officer's technical representative (COTR) could modify, amend, and/or revise the shift duties, start and stop times, and post locations, so long as the change did not impact the overall contract price. Exhibit 1 at 9. The COTR could divert uniformed personnel from their usual assigned duties. *Id.* at 13. However, only the contracting officer could make changes to the terms and conditions of the contract, and those changes had to be in writing:

Changes to the post orders that increase or decrease the number of hours specified, increase or decrease the amount of equipment/supplies required, or otherwise affect the Contractor's cost or the Task Order price, must be made by the CO through a written modification to the Task Order. **The Contractor may be financially liable for accepting or implementing changes made by any unauthorized FPS personnel or tenant agency staff other than the CO; therefore, the Contractor shall be responsible for verifying with the CO whether any requested changes should be provided pending issuance of a modification.**

Id. at 9 (emphasis in original). The contract required the contractor to report to the CO any requested work that it believed was outside the scope of the contract and, therefore, not included in its firm fixed rate. *Id.* at 3-4, 9.

When Hurricane Katrina weather forecasts projected a path directly impacting the area of southern Louisiana, the Federal Emergency Management Agency (FEMA) anticipated that it would need additional guards to support the increased requirements that would arise as a result of the emergency conditions. Accordingly, FEMA asked DHS to obtain guards to provide temporary services for various locations and posts in New Orleans. Deposition of Contracting Officer John Quackenbush (Nov. 5, 2008) (Quackenbush Deposition) at 21. FEMA immediately provided additional funding to cover the services requested. Deposition of Pamela Briggs (Nov. 5, 2008) (Briggs Deposition) at 28; Quackenbush Deposition at 86-87. Pamela Briggs, the COTR, contacted Southwestern on August 28, 2005, and asked

whether Southwestern would be able to provide temporary guard services in support of FEMA's request if Hurricane Katrina made landfall in southern Louisiana. Deposition of Jose Manuel Morales (Nov. 12, 2008) (Jose Morales Deposition) at 13, 17-18; Briggs Deposition at 24, 62-63. If Southwestern could not or would not fulfill the requirement, the Government could contract with other guard companies. Jose Morales Deposition at 23-25; Briggs Deposition at 19-20; Deposition of Joseph Michael Morales (Nov. 12, 2008) (Joseph Morales Deposition) at 29-30. Southwestern voluntarily agreed to supply the additional guard services as requested. Jose Morales Deposition at 23. The initial request, on August 28 and 30, sought four guards for one FEMA facility. Government's Record Submission, Attachment 1. At the same time, immediately after the hurricane, most of Southwestern's guards in the New Orleans area (approximately fifty guards) no longer performed guard services as required under the contract because most of the federal buildings were closed. Jose Morales Deposition at 21; Joseph Morales Deposition at 20, 39.

The parties contacted each other numerous times over the course of the next few days. On September 6, 2005, Jose Morales of Southwestern contacted Ms. Briggs by electronic mail (email):

I know that you are very busy, but I really need to get the documentation for all the services that you have requested us for FEMA. Please send me the documentation as soon as possible. Also, I need to get the letter about the extra expenses incurred by our company due to Katrina that you told me that you were going to send me.

. . . [W]e also need for you to send us documentation on what requirements will be waived in order for us to work out guards there in Louisiana. We need this ASAP as well because we are in the process of moving guards to Louisiana to fill all the posts that FPS is requesting for FEMA and Additional Services. We don't want to move guards that will not be allowed to work. We also need to know if there will be some type of housing and food provided to them by FEMA. Joseph advised that either you or Mr. Boyle had told him that FEMA would provide a place for them to stay. I need to know this because if FEMA is not going to put them up, then we would need to find something for them.

Exhibit 2. Ms. Briggs responded on September 7, 2005, also by email:

Jose -- I am working on the confirmation of service letters right now. There is no letter about the extra expense incurred by your company in relation to the disaster. I advised you to have SWSS [Southwestern] keep track of any additional expenses incurred due to the emergency situation and that from prior experience, someone there should know how to proceed with this information. I cannot advise you on this, but can encourage you to look into this further.

The only locations that were going to be provided lodging and meals were those guards assigned to the Critical Infrastructure Protection posts. Originally, the Office of Emergency Preparedness was trying to lodge and feed all first responders but due to the volume of personnel needing these services, has had to suspend until further notice.

Exhibit 2.²

By letter dated September 8, 2005, Jesse Morales, the president of Southwestern, requested that the hourly rate be increased from \$21.05 to \$32 for all FEMA and other Hurricane Katrina-related additional services. He noted that the last time that Southwestern provided FEMA services, during the Columbia Space Shuttle disaster, it received \$32 per hour for services provided during the crisis. Exhibit 3.

Southwestern sent a second letter dated September 14, 2005, in which it itemized various expenses that it had incurred in support of FEMA's request for additional services. Southwestern claimed that it purchased a motor home to use as a command center. Southwestern listed the following expenses:

<u>One Time Expenses</u>	
Conversion of trailer to sleeping quarters	\$8,500
10,000 watt generator	3,800
30 foot shelter tent	2,100
Portable 200 gallon water tank with gas water pump	1,300
Lighting equipment	400
Fans	400

² Ms. Briggs testified that she did not know specifically what these additional expenses included. Briggs Deposition at 35.

Cots (\$70 each x 20)	1,400
Uniforms (\$387.54 per guard x 20)	7,750
Weapons (\$250 per guard x 20)	5,000

Recurring Expenses

Command Center (per month)	\$1,000
Fuel (per month)	1,000
Meals and Drinks (\$25 per guard x 20)(daily)	500
Portable toilets rental (each per month)	110
Portable showers rental (each per month)	150
Guard transportation (daily)	60

Exhibit 4.

By letter dated September 28, 2005, in response to Southwestern's claim for expenses, the contracting officer, John Quackenbush, stated that "the Government cannot agree to reimburse Southwestern Security Services, Inc., for company-owned equipment. Should any reimbursement be agreed to by the Contracting Officer, based upon the above, such approved property shall become Government-furnished property The Government will not agree to reimbursement for uniforms, as you are required to purchase uniforms for your armed guards performing under your Task Order." Exhibit 5. The contracting officer requested Southwestern identify who directed it to incur the claimed costs, and to specify when the order occurred. In addition, the contracting officer requested that Southwestern provide additional details about the costs claimed, including, for example, identifying the location of the command center, trailer, generator, tent, and other equipment for which it was seeking reimbursement. *Id.* Southwestern did not respond to the contracting officer's request at that time.

During the next few months, DHS requested between thirty-five to forty guards per month to perform temporary FEMA-related guard services. The Government agreed to modify the contract to increase the wages to the higher firm fixed rate of \$32 per hour, and agreed to apply the rate retroactively to include all guard services performed for FEMA. Exhibits 3, 7; Briggs Deposition at 56. The parties increased the hourly rate to cover "all the extra expenses that were being incurred by having to supply all those guards due to the emergency." Jose Morales Deposition at 32. The parties eventually signed a bilateral modification on February 7, 2006, memorializing the agreement. The modification stated, in part:

- a. This modification is issued for separate additional guard services required by FEMA due to Hurricane Katrina at various

southern Louisiana locations and hours as indicated in the attached [Southwestern] invoice numbers 701-706, covering the period of August 29, 2005 through November 30, 2005.

b. The previously negotiated productive hourly rate of \$32 is limited to FEMA disaster-related armed guard service.

Exhibit 7. The modification did not address Southwestern's request for additional expenses.

Ultimately, Southwestern submitted its claim for \$73,275, for extra expenses, on August 22, 2007. On December 10, 2007, Southwestern identified the COTR, Ms. Briggs, as the person who had authorized reimbursement for the expenses. Exhibit 11. In her deposition testimony, Ms. Briggs denied that she authorized the additional expenses. Briggs Deposition at 36, 52, 73. Her testimony is consistent with her email message of September 7, 2005.

DHS denied Southwestern's claim by letter dated February 22, 2008, on the grounds that the contracting officer did not authorize the expenses. Exhibit 12. Southwestern submitted additional information on April 4, 2008, and reduced its claim to \$44,000. The contracting officer denied the claim again on April 11, 2008, on the ground that Southwestern failed to provide any documentation to support its claim. Exhibit 13. Southwestern filed its appeal on July 9, 2008, and, in its complaint, asserts entitlement to damages of \$43,723.69, plus applicable interest, alleging breach of a contract implied in fact.

Discussion

The Positions of the Parties

____ Southwestern's theory is that the additional services provision relied upon to obtain guard services can only apply to the Government's short-term, non-recurring needs for services. This provision cannot cover the additional services ordered by DHS, says Southwestern, because the services extended for almost one year and involved more guards than the amount of guards called for under the original contract. Appellant's Memorandum of Points and Authorities in Support of its Record Submission at 8-9. Thus, when the contracting officer's technical representative contacted appellant for additional guard services for FEMA support, this request did not fall within the scope of the contract. An implied-in-fact contract arose between the parties, and as a result, the Government must reimburse Southwestern for its additional expenses. In Southwestern's view, the Government knew that it could not provide the services without incurring the additional expenses. Thus, according to the contractor, when the Government ordered the services

anyway, it had acquiesced to paying for the expenses, either under an implied-in-fact contract theory or under an institutional ratification theory.

The Government disagrees. It contends that this firm fixed price contract anticipated any claimed increased costs, including those related to the provision of temporary guard services. The contract did not limit the additional services to a specific time period or number of guards. In fact, the Government points out that the number of guards provided by Southwestern did not actually increase. The actual number of temporary guards provided by Southwestern, approximately forty guards, represented fifty percent of its monthly permanent guard force. After the hurricane, many of the permanent posts did not require guards because the federal buildings had closed. Thus, the Government concludes, Southwestern was not providing significantly more, if any more, guards than it usually provided. In any event, even if DHS were liable for the costs, the Government asserts that Southwestern received compensation through the increase in the firm fixed rate paid for FEMA services.

Second, the Government asserts that if Southwestern believed that the contracting officer's technical representative's request for additional services fell outside the scope of the original contract, the contract required it to immediately notify the contracting officer. Southwestern's failure to tell the contracting officer that it considered the orders to be outside the contract prevents it from receiving additional reimbursement for the expenses, according to the Government. No implied-in-fact contract arose from these circumstances.

Firm Fixed Price Contract

It is undisputed that the contract was a firm fixed price contract. It is well-established that absent a special adjustment clause, a contractor with a fixed price contract assumes the risk of increased costs not attributable to the Government. *Gulf Shores, LLC v. Department of Homeland Security*, CBCA 802, 09-1 BCA ¶ 34,024 (2008).

Here, the parties agreed that compensation for guard services would be paid through fixed hourly rates, to include all direct and indirect expenses, as well as profit. The contract contemplated that Southwestern would provide additional guard services in response to natural disasters, with compensation provided in accordance with the temporary or special additional services provisions. The fact that Southwestern's performance was rendered more burdensome or costly due to the severity of Hurricane Katrina does not entitle the contractor to compensation beyond that provided for in the contract. *Gulf Shores, LLC*, 09-1 BCA at 168,305 (citations omitted).

In fact, Southwestern knew that additional expenses should be included in the hourly rate, and it sought an increase in that rate in light of the unexpected scope of the emergency. The Government agreed to modify the contract at Southwestern's request, increasing the hourly rate paid for guard services in order to cover Southwestern's unanticipated increased expenses, including housing, through a bilateral modification to the contract. The evidence in the record supports the conclusion that the hourly rate had been increased to cover these expenses. Southwestern has not produced any evidence to support its claim that the parties intended that the Government would assume any risk if appellant incurred unanticipated expenses. Since the contract did not obligate the Government to pay any expenses not encompassed in the hourly rate, we conclude that Southwestern's claim for additional expenses must be denied.

Implied-In-Fact Contract

Southwestern's theory that an implied-in-fact contract arose when the contracting officer's technical representative ordered the additional services in support of FEMA does not lead to a more successful resolution. The requirements for an implied-in-fact contract are the same as for an express contract; only the nature of the evidence differs. An implied-in-fact contract is founded upon a meeting of the minds and is "inferred, as a fact, from the conduct of the parties showing, in light of the surrounding circumstances, their tacit understanding." *Hercules, Inc. v. United States*, 516 U.S. 417, 424 (1996) (quoting *Baltimore & Ohio R. Co. v. United States*, 261 U.S. 592, 597 (1923)); see also *Flexfab, L.L.C., v. United States*, 424 F.3d 1254, 1265 (Fed. Cir. 2005). In order to prove an implied-in-fact contract with the Government, appellant must demonstrate: (1) mutuality of intent; (2) consideration; (3) an unambiguous offer and acceptance; and (4) "actual authority" on the part of the Government representative. *Flexfab*, 424 F.3d at 1265; see *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947).

In this case, no one disputes that the contracting officer's technical representative had the authority to order the additional services for FEMA support under the terms of the contract. Indeed, Southwestern's argument is premised upon this in part -- the theory is that because the COTR could legitimately order these services under the contract, she could also agree on behalf of the Government to pay for the additional expenses, which, in the words of the contractor, are "part and parcel" of the FEMA additional services. Appellant's Memorandum at 12.

Southwestern's main argument, however, is that these additional services fall outside the contract, and so the obligation to pay Southwestern's extra expenses was not governed by the contract (and, ultimately, not limited by the fixed pricing in the contract.). The issue, then, is not whether the contracting officer's technical representative had authority to bind the

Government under the contract, but, instead, whether the contracting officer's technical representative had authority to bind the Government independent of the contract. *See H. Landau & Co. v. United States*, 886 F.2d 322, 324 (Fed. Cir. 1989) (limiting inquiry to whether government officials possessed binding authority).

Actual authority may be express or implied. *Anderson v. United States*, 344 F.3d 1343, 1353 n.3 (Fed. Cir. 2003). A Government agency possesses express actual authority to bind the Government in contract only when the Constitution, a statute, or a regulation grants it to the agency in unambiguous terms. *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990).

Here, the applicable regulation, the Federal Acquisition Regulation (FAR), provides in pertinent part:

Contracts may be entered into and signed on behalf of the Government only by contracting officers.

48 CFR 1.601(a) (2004). The FAR further provides:

(a) Contracting officers have authority to enter into, administer, or terminate contracts and make related determinations and findings. Contracting officers may bind the Government only to the extent of the authority delegated to them.

...

(b) No contract shall be entered into unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met.

48 CFR 1.602-1. Furthermore, the FAR provides that "only contracting officers acting within the scope of their authority are empowered to execute the contract modifications on behalf of the Government." 48 CFR 43.102(a); *see also Corners and Edges, Inc. v. Department of Health and Human Services*, CBCA 648, 07-2 BCA ¶ 33,706, at 166,891; *Flexfab*, 424 F.3d at 1260 ("A party seeking to enter into an agreement with the government can abate the risk by taking particular care to insure [sic] that it negotiates with a government agent whose status is that of a 'contracting officer.'")

Southwestern posits that the "authorization for the reimbursement of the extra expenses comes not from the contract, but from the terms under which Ms. Briggs orally requested the

services and Southwestern orally accepted the order.” Appellant’s Memorandum at 14-15. Outside of this bold conclusion, Southwestern has not provided any evidence to show that the contracting officer’s technical representative had any authority to bind the Government. As mentioned above, to the extent that she had authority to issue orders for services, that authority arose from the terms of the contract -- contract terms which, under Southwestern’s theory, are inapplicable here.

Without any evidence that the contracting officer’s technical representative had been expressly granted authority to bind the Government, we turn to examine whether the COTR possessed implied actual authority to contract on behalf of the Government based on her position. A government official with implied actual authority can bind the Government “when such authority is considered to be an integral part of the duties assigned to a government employee.” *H. Landau & Co.*, 886 F.2d at 324 (quoting John Cibinic, Jr. & Ralph C. Nash, Jr., *Formation of Government Contracts* 43 (1982)). Contracting authority is integral to an employee’s duties when the employee cannot perform the assigned tasks without such authority and when the relevant agency’s regulations do not grant the authority to other agency employees. *Id.*

In this case, the express language of the contract stated that only the contracting officer could make changes to the terms and conditions of the contract affecting price (and those changes had to be in writing). At the very least, the contract placed Southwestern on notice as to the limited authority of the contracting officer’s technical representative. Southwestern should have investigated further into the issue of authority when it believed that it was entering into a separate contract with the contracting officer’s technical representative. We find that the contracting officer’s technical representative’s actions cannot be considered to bind the Government in a separate contract.

Institutional Ratification

Finally, Southwestern argues that even if Ms. Briggs did not expressly authorize the extra expenses at the time that she ordered the services, “contracting principles and fundamental fairness dictate that they be deemed institutionally ratified by the agency’s actions.” Appellant’s Memorandum at 15. Institutional ratification of an implied-in-fact contract may occur where a government agency accepts benefits followed by a promise of payment by the agency. *Janowsky v. United States*, 133 F.3d 888, 891-92 (Fed. Cir. 1998); *D&F Marketing, Inc.*, ASBCA 56043, 2009 WL 810850 (Mar. 9, 2009). A key element of institutional ratification is knowledge of all the facts related to unauthorized action by officials who are empowered to ratify agreements. *City of El Centro*, 922 F.2d at 821; *Gary v. United States*, 67 Fed. Cl. 202, 217 (2005).

Here, there is no evidence that either an authorized official or DHS as an institution ratified Southwestern's request for reimbursement of its costs. As noted previously, the contracting officer and the contracting officer's technical representative both testified that they were unaware of the specifics of Southwestern's additional costs, only that the contractor sought reimbursement of certain costs. In addition, the contracting officer and the contracting officer's technical representative clearly informed Southwestern that the Government would not pay any of Southwestern's additional costs. In fact, as discussed previously, in his September 28, 2005, letter to Southwestern, the contracting officer told Southwestern that it would not be entitled to reimbursement for any additional expenses incurred without authority, and specifically asked Southwestern to provide information to support its claim, which Southwestern failed to provide until two years later. Nothing in the record supports Southwestern's contention that the agency, or, specifically, officials with ratifying authority, knew about the alleged promise to Southwestern to pay for expenses in addition to paying the negotiated hourly rate for temporary additional guard services, accepted the benefits of the promise, and took actions to ratify the promise.

Decision

The appeal is hereby **DENIED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

BERYL S. GILMORE
Board Judge

HOWARD A. POLLACK
Board Judge